In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-238

DUNORD CAFÉ, INC., & JOSEPH J. MANZELLA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a trial by jury in the United States District Court for the District of Massachusetts, petitioners were convicted of (Count 1) possessing unstamped distilled spirits, in violation of 26 U.S.C. 5205(a)(2); (Count 3) possessing liquor bottles which had been unlawfully refilled, in violation of 26 U.S.C. 5301(c)(2); and (Count 5) possessing bottles of liquor which had been diluted, in violation of 26 U.S.C. 5301(c)(4). Defendant Manzella was given a sus-

pended sentence of imprisonment for two months and placed on probation for one year. Both he and the corporate defendant were sentenced to pay a fine of $500 (Pet. App. 12). The court of appeals affirmed (Pet. App. 15-16).

1. One of five character witnesses for petitioner Manzella testified that people in the neighborhood spoke well of petitioner. On cross-examination the assistant United States attorney asked the witness if all he knew was that Manzella was a "good guy" who "donates to the local charities." The witness answered "I wouldn't say charities." "What would you say?" asked defense counsel on redirect. There was objection and a colloquy as to what this line of questioning had to do with reputation. The court said, "It may be the Mafia. Next question" (2 Tr. 146-147, Pet. 8, fn. 5). Viewed in context, the court's remark was clearly not a suggestion that Manzella was a member of the Mafia. Indeed, counsel made no objection and did not mention the remark in his motion for a new trial, which suggests that at the time the remark was made, no one interpreted it in the pejorative sense suggested by petitioner. In any event, this apparently inconsequential occurrence did not rise to the level of plain error.

2. Petitioners' other contention relates to the admissibility of the bottles which formed the basis of Count 1, a count not necessary to support the general suspended sentence and fine in this case.

On a motion to suppress evidence it was shown that on June 17, 1969, a federal agent and two police of-

ficers went to the Golden Nugget, a taproom operated in the City of Worcester, Massachusetts, by the corporate petitioner and by Manzella, president of the corporation. The officers first examined bottles on the bar (1 Tr. 9-10). There was a locked door near the ladies' room. According to the testimony of the agent, he did not directly order Manzella to open the door; however, Manzella, after a mild protest that there was nothing in the room which would interest the agent, was very cooperative and unlocked the door (1 Tr. 13-14). According to the testimony of Manzella, he told the officers it was all right to inspect the place, but when they came to the locked room, he told them it contained only his personal belongings and unlocked it only when ordered to do so (1 Tr. 17-20). The agent found and seized within the locked room an unstamped bottle which contained liquor and which was the basis of Count 1 (1 Tr. 14).[1] Other contents of the room included cartons, tires, an air conditioner, possibly dishes, knives and forks (1 Tr. 15). Manzella said that the items in this room were personal; that he catered for clambakes in the summer (1 Tr. 19). The court denied the motion to suppress (1 Tr. 20).

On appeal petitioners limited their contention as to the search and seizure to the factual claim, decided adversely to them, that this was a private storage room not within the business premises and that the contents of the bottles were not intended for sale.

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[1] The unstamped bottle contained alcohol and cherries and was claimed by Manzella at trial as his personal stock, given to him by a friend (1 Tr. 36-37, 64-65).

Here petitioners contend again that the locked room was unconnected with the business simply because of Manzella's self-serving testimony to that effect. The judge who heard the motion to suppress and the jury did not have to believe this testimony or the testimony that the contents of the unstamped packages kept in the storage room of the cafe were not intended for sale.

Petitioners conceded below the right of the agent to inspect and search the place of business. They urge here that the ruling below was in violation of *Camara* v. *Municipal Court*, 387 U.S. 523; *See* v. *City of Seattle*, 387 U.S. 541; and *Colonnade Corp.* v. *United States*, 397 U.S. 72. However, even assuming that the facts were as suggested by petitioners, none of these cases is relevant to the contention made in this case. *Camara* related to the right of a building inspector to enter a private dwelling without a warrant to ascertain whether there was compliance with building regulations. *See* involved a similar question as to business premises and fire regulations. The Court there expressly stated that its holding did not extend to "licensing programs which require inspections prior to operating a business or marketing a product" (387 U.S. at 546). This exclusion from the requirement of a warrant was again recognized in *Colonnade*, where the Court's ruling was explicitly placed on the use of force in breaking down a door. There was no force used here.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1971.

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